

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL HUGO UHL,

Defendant-Appellant.

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UNPUBLISHED

June 29, 1999

No. 203701

Recorder's Court

LC No. 96-503949

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit unarmed robbery, MCL 750.88; MSA 28.283, and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced defendant as an habitual offender third-offense, MCL 769.11; MSA 28.1083, to ten to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that because the prosecutor failed to present evidence that defendant took property belonging to the victim, the trial court erred by instructing the jury on the crime of unarmed robbery. We disagree. "The elements of unarmed robbery are: (1) the felonious taking of property that may be the subject of a larceny from the person or presence of the victim, (2) by force and violence, assault, or putting in fear, (3) while not armed with a dangerous weapon." *People v Himmelein*, 177 Mich App 365, 378-379; 442 NW2d 667 (1989). A witness testified that as the victim was leaving the bar, defendant, who had been outside of the bar for several minutes, stepped inside the back door, grabbed the victim and pulled him outside the bar. The witness watched on a security camera monitor as defendant and two unidentified men from the bar kicked and punched the victim in his head and chest while he was on the ground. After the beating, the witness could see on the monitor that defendant went through the victim's pockets. The victim testified that when he went to the bar he was carrying some money in his pocket and some in his wallet. When he woke up in the hospital, after the incident, there was no money in his pocket. Viewed in the light most favorable to the prosecution, there was sufficient evidence presented to permit a rational trier of fact to find that the elements of unarmed robbery were proven beyond a reasonable doubt. Hence, the trial court properly instructed the jury on unarmed robbery.<sup>1</sup>

Further, based on the same proofs, there was sufficient evidence presented to sustain defendant's conviction for assault with intent to commit unarmed robbery. To convict a defendant of assault with intent to rob while unarmed, the prosecution must prove beyond a reasonable doubt, "an assault, i.e., an attempt or offer to do corporal injury with the present intention and present ability to carry out that offer, with force and violence, and with the intent to rob and steal, and the defendant being unarmed." *People v Chandler*, 201 Mich App 611, 615; 506 NW2d 882 (1993). Viewed in the light most favorable to the prosecution, sufficient evidence was presented to sustain defendant's conviction for assault with intent to commit unarmed robbery. *Id.*

Defendant next argues that he was denied a fair trial because the trial court failed, sua sponte, to instruct the jury on the lesser included offense of attempted unarmed robbery. We disagree. Defendant's failure to object to the jury instructions, or to request that the trial court instruct the jury on attempted unarmed robbery, limits our review to the question of whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

Jury instructions are reviewed by this Court in their entirety to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses and theories if the evidence supports them. *Id.* Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. *Id.*

We find that the jury instructions fairly presented the issues for trial and sufficiently protected the defendant's rights. *Piper, supra* at 648. We find no error in the trial court's failure to instruct sua sponte on the lesser included offense of attempted unarmed robbery. Except for cases involving a first-degree murder charge, there is no duty to sua sponte instruct on lesser included offenses. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). Since this case does not involve a charge of first-degree murder, the trial court was not obligated to sua sponte instruct on the lesser included offense.

Alternatively, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to request an instruction on attempted unarmed robbery. We again disagree. Because defendant did not move for a new trial or an evidentiary hearing before the trial court on the ground that he received ineffective assistance of counsel, review is limited to the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, that the result of the proceeding was fundamentally unfair or unreliable, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Trial counsel is presumed to have provided effective assistance, and defendant bears the burden of overcoming this presumption. *People v Carr*, 141 Mich App 442, 451; 367 NW2d 407 (1985).

Where the jury instructions as given adequately and fairly presented to the jury the issues to be tried and sufficiently protected the rights of the defendant, the failure of defense counsel to object to the instructions as given or to request additional instructions does not deny the defendant a fair trial with a reliable result. *People v Curry*, 175 Mich App 33, 43; 437 NW2d 310 (1989). Therefore, because we have concluded that the jury instructions fairly presented the issues for trial and sufficiently protected defendant's rights, defendant has failed to persuade this Court that he was denied the effective assistance of counsel.

Defendant next argues that because of its poor quality, the trial court erred in admitting a security camera video tape and testimony related to the contents of the tape. As indicated above, a key witness watched the assault from a security camera monitor. Defendant's claim of error regarding the admission of the video tape is without merit. MRE 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponents claim." In this case, a witness identified the video tape as an accurate depiction of what he observed on the security monitor. Therefore, the video tape was properly authenticated. The poor quality of the video tape bore upon the credibility of the authenticating witness – a matter to be resolved by the jury.

Defendant's final argument is that the cumulative effect of the errors he raised on appeal denied him a fair trial. We disagree. The test to determine whether a case requires reversal for cumulative error is not whether there are some irregularities at trial, but whether defendant was denied a fair trial. *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975). Because we find that there were no errors in the trial requiring reversal, this final argument is without merit.

Affirmed.

/s/ Hilda R. Gage  
/s/ Michael R. Smolenski  
/s/ Brian K. Zahra

<sup>1</sup> Defendant's argument that automatic reversal is required because there was insufficient evidence to support sending the case to the jury on the unarmed robbery charge, is not only without factual merit, it is also without legal merit. Automatic reversal where a jury is permitted consideration of a charge unwarranted by the proofs, pursuant to *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975), has been overruled by *People v Graves*, 458 Mich 476, 483; 581 NW2d 229 (1998). Pursuant to the holding in *Graves, supra*, the error will be reviewed to determine if it was harmless beyond a reasonable doubt. Since we find sufficient facts to support the instruction to which defendant objects, we need not review defendant's claim under the *Graves* standard.